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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1021

JOHN ROSSELLI,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, not yet officially reported, is set forth in the Appendix.

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTION PRESENTED

In criminal cases in which review is sought or obtained in the Supreme Court, does the time within which to file a motion to reduce sentence in District Court under Rule 35 of the Federal Rules of Criminal Procedure commence to run when the order of the Supreme Court is entered on its docket or when the order of the Supreme Court is entered on the lower court's docket.

## FEDERAL RULE INVOLVED

Rule 35 of the Federal Rules of Criminal Procedure provides:

### CORRECTION OR REDUCTION OF SENTENCE

> The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order of judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

## STATEMENT OF THE CASE

### A. CONVICTION AND APPEAL

The petitioner, John Rosselli, was convicted following a trial by jury in the United States District Court for the Central District of California of violating 18 U.S.C. 371, 1952 and 2314 and 26 U.S.C. 7206(1). On February 3, 1969, the petitioner was sentenced to a term of five years under 18 U.S.C. 4208(a)(2) and was fined $55,000.00.[1]

On September 28, 1970 the Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. On December 22, 1970, the Court of Appeals denied the petitioner's petition for rehearing and issued its mandate which was received by the District Court on December 23, 1970.

Thereafter, the petitioner filed a petition for a writ of certiorari with this Court which, on February 22, 1971, was denied. *United States v. Roselli* [sic] 401 U.S. 924 (1971). On March 2, 1971, the Clerk of this Court sent to the Clerk of the Court of Appeals for the Ninth Circuit a letter which notified the Court of Appeals of this Court's denial of the petitioner's petition for a writ of certiorari. This letter was received by the Court of Appeals for the Ninth Circuit on the following day, March 3, 1971.

### B. DISTRICT COURT'S PROCEEDINGS ON THE PETITIONER'S MOTION TO REDUCE

On June 28, 1971 – 117 days after entry of the order of the Supreme Court denying review of the petitioner's

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[1] The judgment imposing the fine contained a "Stand Committed" order until the fine was paid.

conviction on the docket of the Court of Appeals for the Ninth Circuit, but 125 days after entry of the order on the docket of the Supreme Court – the petitioner filed a motion for reduction of sentence in the District Court. On July 6, 1971 a hearing on the petitioner's motion was held in the United States District Court before the Honorable William P. Gray. The Government did not question the District Court's jurisdiction at this hearing. The hearing was continued until October 18, 1971, at which time the District Court reduced the petitioner's period of incarceration from five years to four years. After reducing the petitioner's period of incarceration, the Court and counsel had the following exchange (Tr. 13):

> "THE COURT: . . . To the extent there is a request for modification of the fine, I am going to deny that without prejudice. If it can be shown that Mr. Rosselli cannot pay a fine, and I don't propose to make a fine where the condition of his release cannot be met, so if you can show better than you have now that Mr. Rosselli's inability to pay the $55,000.00 fine, I will consider it.
>
> "MR. MARSHALL [Mr. Rosselli's counsel]: Your Honor, are you retaining jurisdiction?
>
> "THE COURT: The Motion was made within 120 days after affirmance on appeal. I am modifying the prison sentence of the matter indicated and I am denying but retaining jurisdiction over the matter of the fine."

On March 6, 1973 the District Court formalized that portion of the October 18, 1971 ruling vacating the "Stand Committed" portion of the fine. On March 6, 1974, the

petitioner moved to reduce his fine, relying upon the District Court's ruling on October 18, 1971. On March 18, 1974, the Government filed an opposition in which for the first time the Government questioned the jurisdiction of the District Court to reduce the petitioner's sentence. On March 25, 1974, the District Court reduced the petitioner's fine to $10,000.00. Thereafter, the Government noted an appeal to the United States Court of Appeals for the Ninth Circuit. The Government also petitioned the Court of Appeals for a writ of mandamus ordering the District Court to vacate its orders.

### C. APPELLATE PROCEEDINGS ON THE PETITIONER'S MOTION TO REDUCE

The Court of Appeals for the Ninth Circuit granted the petition for a writ of mandamus, and held that, since the petitioner's motion to reduce his sentence was not filed in the District Court until June 28, 1971 – 125 days after the Supreme Court action – the District Court was without power to remit the fine pursuant to its order of March 25, 1974.

## ARGUMENT

### IN CRIMINAL CASES IN WHICH REVIEW IS SOUGHT OR OBTAINED IN THE SUPREME COURT, THE TIME WITHIN WHICH TO FILE A MOTION TO REDUCE SENTENCE IN THE DISTRICT COURT UNDER RULE 35 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE COMMENCES TO RUN WHEN THE ORDER OF THE SUPREME COURT IS ENTERED ON THE LOWER COURT'S DOCKET.

I. This appeal presents a question calling for a construction of Rule 35 of the Federal Rules of Criminal Procedure. Rule 35 provides in part that "The [district] court

reduce a sentence . . . within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding a judgment of conviction." The Rule does not state whether the 120 day period begins to run when the "order or judgment of the Supreme Court" is entered on its docket or when "the order or judgment of the Supreme Court" is entered on the docket of the lower court. The District Court, without opinion, construed Rule 35 so that the 120 day period began to run when "the order or judgment of the Supreme Court" was entered on the docket of the lower court. The Court of Appeals for the Ninth Circuit construed Rule 35 so that the 120 day period began to run when "the order or judgment of the Supreme Court" was entered on the Supreme Court docket. To our knowledge, this is a case of first impression. Resolution of the question presented would clarify an ambiguity in Rule 35 which deals directly with the jurisdictional time period within which the District Court may reduce a sentence following proceedings in this Court. For this reason, we believe this case is of sufficient importance to warrant review by this Court. We turn briefly to the merits.

II. In holding that the 120 day period began to run when the order of the Supreme Court is entered on the Supreme Court docket, the Court of Appeals relied on the 1966 amendment to Rule 35 and the Notes of the Advisory Committee. Prior to 1966, the Rule provided in part that "the [district] court may reduce a sentence . . . within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari." The Advisory Committee observed that Rule 35 did not cover three situations: (1) those cases in which a writ of certiorari is denied but the order is not sent to the lower court; (2) those cases in which a writ of certiorari is granted but

later dismissed; and (3) those cases in which the writ of certiorari is granted and the Court affirms a judgment of the Court of Appeals affirming a conviction. The Advisory Committee Notes state:

> The amendment makes it clear that in each of these situations the 120 day period commences to run with the entry of the order or judgment of the Supreme Court.

The Advisory Committee Notes make it clear that the amendment covers orders and judgments of the Supreme Court which were not covered by Rule 35 prior to the 1966 amendment. But contrary to the observation of the Court of Appeals, the Advisory Committee Notes do not make it clear that the 120 day period begins to run with the entry of the order or judgment *by* the Supreme Court. In fact, the Advisory Committee Notes and the Rule both contain the same language – "the order or judgment *of* the Supreme Court." Neither states by which court the order is to be entered before the time begins to run. Both use the descriptive prepositional phrase "of the Supreme Court" modifying the words "order or judgment" and omit all reference to the court in which the order is to be entered. If the Advisory Committee Notes and Rule 35 were clear regarding the commencement of the time period, they would state that the motion may be filed within 120 days after entry of an order *by* the Supreme Court.

A construction of the Rule which provides for commencement of the time period with entry by the District Court of the order of the Supreme Court would be consistent with the Rule's purpose and other provisions. The Rule provides in cases in which no petition for a writ of certiorari is filed for the time to commence with receipt by the District Court of the mandate issued by the Court

of Appeals. Similarly, in cases in which no appeal is taken, the 120 day period commences after sentence is imposed. Thus, in both instances, a defendant has 120 days within which to act if he desires to move for a reduction of sentence. If, however, in cases appealed to this Court the time commenced with the entry of this Court's order on its docket, a defendant would have less than 120 days within which to act. The District Court has no power to entertain a motion to reduce sentence while an appeal is pending. *United States v. Mack*, 466 F.2d 333, 340 (D.C. Cir.) *cert. denied*, 409 U.S. 952 (1972). The District Court, therefore, will not entertain a motion to reduce sentence until it receives notification that the appellate process has been exhausted or, as in this case, the petition for certiorari has been denied. In some instances, notification can take several days. In other instances, it can take longer. In this case, for example, the Court of Appeals for the Ninth Circuit received notification from this Court of the denial of the petition for certiorari nine days after entry of this Court's order on its docket. An administrative error or postal inefficiency which resulted in a delay of more than 120 days between entry by this Court of its order and notification by this Court to the lower court would in effect deprive a defendant of the opportunity to file a motion to reduce sentence if the 120 day period commenced to run from entry by this Court of its order on its docket. A construction of the Rule which could deprive a defendant of the opportunity to file a motion to reduce sentence is neither equitable nor consistent with the Rule's purpose. Furthermore, since Rule 35 is a rule of criminal procedure, it should be construed liberally, giving a defendant and the District Court ample opportunity to act.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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|---|---|
| UNITED STATES OF AMERICA, *Petitioner,* vs. UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, *Respondent,* MAURICE H. FRIEDMAN AND JOHN ROSSELLI, *Real Parties in Interest.* | No. 74-1827 OPINION |
| UNITED STATES OF AMERICA, *Plaintiff-Appellant,* vs. MAURICE H. FRIEDMAN, *Defendant-Appellee.* | No. 74-2134 |
| UNITED STATES OF AMERICA, *Plaintiff-Appellant,* vs. JOHN ROSSELLI, *Defendant-Appellee.* | No. 74-2135 |

[January 20, 1975]

Appeal from the United States District Court
for the Central District of California

Before: WRIGHT and CHOY, Circuit Judges, and BURNS,* District Judge.

CHOY, Circuit Judge:

The Government appeals from district court orders reducing fines assessed against Rosselli and Friedman. The Government

*Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

also petitions this court for a writ of mandamus ordering the district court to vacate its orders. We grant the writ.

### *Statement of Facts*

Friedman and Rosselli were tried together in the Central District of California and convicted on December 2, 1968 on several counts for violating 18 U.S.C. §§ 371, 1952, 2314[1] Rosselli was sentenced to five years imprisonment, fined $55,000 and was ordered to "stand committed" until the fine was paid. Friedman's sentence consisted of a six year prison term, a fine of $100,000 and a "stand committed" order until the fine was paid. On December 22, 1970, this court affirmed on all counts the judgment against Rosselli, and reversed Friedman's conviction on one count while affirming all remaining counts. On February 22, 1971 the Supreme Court denied Rosselli's petition for a writ of certiorari and filed the order that day. *United States v. Roselli* [sic], 401 U.S. 924 (1971). However, notification of the Supreme Court's action was not mailed to this court until March 2, 1971 and not received until one day later. Notification of the denial of certiorari was never sent to the district court.

On June 28, 1971 Rosselli filed in the district court a motion for reduction of sentence. On October 18, 1971 the district court ordered a reduction in the term, denied for the time being the request to reduce the fine, but specifically stated it was retaining jurisdiction over the matter of the fine. Several months later, Rosselli moved for a reduction of the fine, but the court on March 6, 1973 merely vacated the "stand committed" order. A year later, Rosselli again moved the court to reduce the fine, and on March 25, 1974 the court reduced the fine to $10,000.

Friedman originally moved for a reduction of sentence on February 23, 1971, 62 days after the district court received this court's mandate affirming his conviction. On May 3, 1972, the court reduced Friedman's sentence to time served. Almost two years later, on February 4, 1974, Friedman filed a motion to clarify the order reducing sentence or, in the alternative, to reduce sentence. The district court on March 25, 1974 reduced

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[1]Rosselli was also convicted on one count for violation of 26 U.S.C. § 7206 (1).

the fine to $75,000 and then, in a modifying order on April 18, 1974, further reduced the fine by $25,000.

Uncertain whether the proper procedure to obtain review in this court of the sentence reduction orders was by appeal or by petition for a writ of mandamus, the Government pursued both methods. On April 24, 1974 the Government appealed directly from the March 25 orders, and on May 8, 1974 filed a petition for writ of mandamus to vacate the district court orders of March 25 and April 18, 1974. The appeals and the petition have been consolidated for disposition by this court. However, since we conclude that a writ should issue in this case, we need not consider the direct appeal nor decide whether an order to reduce sentence under F.R.Crim.P. 35 is appealable by the Government. *United States v. Mehrtens*, 494 F.2d 1172, 1174 (5th Cir. 1974).

*Petition for Writ of Mandamus*

Friedman and Rosselli, the real parties in interest in the action for the writ, contend that this court should in the exercise of discretion deny the petition without ever reaching the merits. Although it is well established that granting of a writ of mandamus is an extraordinary remedy and lies in the sound discretion of the court [*United States v. Lane*, 284 F.2d 935, 939 (9th Cir. 1960); *United States v. Carter*, 270 F.2d 512, 524 (9th Cir. 1959)], writs have been issued, in cases similar to the present one, directing a district court to vacate an invalid order suspending sentence. *See e.g., Ex parte United States*, 242 U.S. 27 (1916); *United States v. Regan*, ..... F.2d ....., No. 74-1559 (8th Cir., Oct. 11, 1974); *United States v. Mehrtens, supra; United States v. Gibbs*, 285 F.2d 225 (9th Cir. 1960); *United States v. Lane, supra.* Friedman and Rosselli do not contend that laches or other equitable circumstances exist militating against the writ [see *United States v. Old*, 426 F.2d 562 (3d Cir. 1970); *United States v. Carter, supra*], and we find no valid reason to refrain from considering the petition.

*Rule 35*

F.R.Crim.P. 35 provides in part:

> The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the

> court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction.

Because F.R.Crim.P. 45(b) states that the court may not enlarge the period for taking action under Rule 35, the 120 day requirement in Rule 35 is a mandatory one. Thus, unless the 120 day requirement is met, the court has no jurisdiction or power to alter sentence. *U.S. v. Regan*, ..... F.2d at .....; *United States v. Mehrtens*, 494 F.2d at 1176; *Peterson v. United States*, 432 F.2d 545, 546 (8th Cir. 1970); *United States v. Ellenbogen*, 390 F.2d 537, 541 (2d Cir.), *cert. denied* 393 U.S. 918 (1968); *Irizzary v. United States*, 58 F.R.D. 65, 66-67 (D. Mass. 1973). *See also United States v. Marchese*, 341 F.2d 782, 788 (9th Cir.), *cert. denied* 382 U.S. 817 (1965).

*Rosselli's Case*

The Government contends that the 120 day period for Rosselli began to run on February 22, 1971, the day the Supreme Court denied Rosselli's petition for certiorari. Since Rosselli's original motion to reduce sentence was not filed until June 28, 1971—125 days after the Supreme Court action—the Government argues that the district court was without power later to reduce sentence on March 25, 1974.[2]

The validity of this argument depends on an interpretation of Rule 35, specifically the phrase: ". . . within 120 days *after entry* of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction." (emphasis added) Rosselli contends that "entry" does not refer to entry on the Supreme Court docket sheet, but to entry or filing at the court of appeals or at the district court. If Rosselli's contention is correct, his motion was timely since

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[2]Rosselli contends that the Government's failure to raise jurisdictional defects at the pre-March 25, 1974 hearings on sentence reduction precludes it from raising that issue here. This argument is without merit. *See* Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan, 111 U.S. 379 (1884).

notice of denial of the petition for certiorari was not filed in this court until March 3, 1971 and still has not been filed at the district court.

Before the 1966 amendments to Rule 35, the Rule read in part: "The court may reduce a sentence . . . within 60 days *after receipt* of an order of the Supreme Court denying an application for a writ of certiorari." (emphasis added) The Advisory Committee Note to Amended Rule 35 states the reason for the change:

> If the writ were denied, the last phrase of the rule left obscure the point at which the period began to run because orders of the Supreme Court denying applications for writs are not sent to the district courts. See *Johnson v. United States*, 235 F.2d 459 (5th Cir. 1956) . . . . The amendment makes it clear that . . . the 120-day period commences to run with the entry of the order or judgment of the Supreme Court.

Thus, the history of the rule and the Advisory Committee Note are consistent with the plain meaning of the amended rule that the 120 day period begins to run the day of the Supreme Court order and entry in *its own* docket sheet. *See Peterson v. United States*, 432 F.2d 545, 546 (8th Cir. 1970). The district court, therefore, had no power to reduce Rosselli's fine on March 25, 1974.[3]

*Friedman's Case*

It is undisputed that Friedman's original motion to reduce sentence, filed on February 23, 1971, was filed well within the 120 day period. Acting on the motion, the district court on May 3, 1972 ordered reduction of the prison term to time served.[4]

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[3]The court order of October 18, 1971, reducing the prison sentence to time served, and order of March 6, 1973, vacating the "stand committed" order, are not challenged on appeal nor are subjects of the writ petition. Therefore, our decision with respect to the validity of the March 25, 1974 order in no way affects the validity of the earlier orders.

[4]This court order is not challenged by the Government and is not before us on appeal or on the petition for writ of mandamus.

Friedman's second motion to reduce sentence was not filed until February 4, 1974, more than three years after the original 120 day period began to run and almost two years after entry of the "time served" order. Believing that it had jurisdiction to consider the second motion, the court reduced Friedman's fine on March 25, 1974 and again on April 18, 1974.

Friedman's contention that the court had power to modify sentence in 1974 is based solely on *Leyvas v. United States*, 371 F.2d 714 (9th Cir. 1967), which held that a court may act beyond the Rule 35 time period if defendant within the period filed a motion to reduce sentence. *Id.* at 719. Although *Leyvas* was decided under former Rule 35, which provided for only a 60 day time period, we find that the case is equally applicable to the new rule's 120 day limit. *See United States v. Polizzi*, 500 F.2d 856, 896 n. 73 (9th Cir. 1974), *petition for cert. pending; Fuentes v. United States*, 371 F. Supp. 92, 94 (D. Puerto Rico 1973); *United States v. Ursini*, 296 F. Supp. 1152, 1153 (D. Conn. 1968). The literal language of the rule does define the period not as the time within which the motion may be made, but as the time within which the court may act. However, as long as the district judge acts with reasonable speed after the timely motion is filed, the time limit should be flexible enough to give him an opportunity to hear and consider new evidence regarding the appropriateness of the sentence.

The extension of *Leyvas* to amended Rule 35 cases, however, does not bolster Friedman's position because the decision is wholly inapplicable to the present case. In *Leyvas*, only *one* motion to reduce sentence was filed and the hearing on that motion was held just eight days after expiration of the 60 day period. On the same day of the hearing the court orally modified sentence, and 11 days later—merely nineteen days beyond the 60 day period—the court entered its formal order. 371 F.2d at 719.

In distinct contrast, the challenged court order here was entered more than three years after expiration of the original 120 day period and was made pursuant to a *second* motion to reduce sentence, a motion totally new and separate from the original one which had been filed and acted upon several years

earlier.[5] Friedman's motion of February 4, 1974 cannot relate back to his original timely motion to reduce sentence, and the court on March 25 and April 18, 1974 lacked power to consider the new motion. *See United States v. Regan*, ..... F.2d ....., ....., No. 74-1559 (8th Cir., Oct. 11, 1974); *United States v. Hughes*, 36 F.R.D. 25, 26 (S.D.N.Y. 1964).

Even if the second motion was, as Friedman contends, merely one for clarification of the first order or even if the district court on May 3, 1972 purported to "retain jurisdiction" over the sentence, the court's action on March 25 and April 18, 1974 cannot be upheld. To rule otherwise would all but nullify the 120 day time limit and would undermine completely the purpose of Rule 35 which was enacted, in part, to limit the period over which the district court has discretionary control over its own sentences.[6] *See* Original Committee Note to Rule 35. *Leyvas* does not hold that a district court may retain jurisdiction over a sentence indefinitely, and no authority supports such a proposition.

Petition for writ of mandamus granted.

BURNS, J.: Dissent.

I dissent. I would deny mandamus relief because this is an ordinary case, while mandamus is an extraordinary remedy (*U.S. v. Lane*, 284 F.2d 935, 939 (9th Cir. 1960); *U.S. v. Carter*, 270 F.2d 521, 524 (9th Cir. 1959)), and should be saved for extraordinary cases.

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[5]The contention that the second motion was merely one for clarification of the first order modifying sentence and that the district judge on May 3, 1972 intended to "retain jurisdiction" over the sentence is without support in the record.

[6]As Professor Moore has noted, "Some limitation on the court's power seems to be necessary, for after a lapse of time the peculiar ability of the court to determine sentence gives way to the presumably greater competence, and knowledge, of penal authorities." 8A J. Moore, Federal Practice ¶ 35.02[1] at 35-4 n.5 (2d ed. 1974): *cf.* United States v. Smith, 331 U.S. 469, 476 (1947). Furthermore, some limitation is necessary to protect the district court judge from continual importunities while the defendant is serving his sentence.

The effect of the majority opinion is that Rosselli's original motion to reduce, having been filed June 28, 1971, or 128 days after the Supreme Court acted, was beyond the power of the District Court to grant. For reasons known best to the Prosecutor, no challenge was posed to the Court's action of October 18, 1971, reducing the term of Rosselli's confinement. Rosselli on January 12, 1973, filed a further motion for reduction or modification of the fine. In response, the Court on March 6, 1973, vacated the "stand committed" order.[1] Again the Prosecutor did nothing, though this later action was based upon a motion which came nearly a year and a half after the 120 days had run. It was not until the March 1974 court action reducing the fine that the Prosecutor bothered to challenge the Court's action. In the absence of an adequate explanation by the Prosecutor as to why he did not see fit to challenge either the District Judge's original reduction of the prison term or the later elimination of the "stand committed" clause, I see no reason whatsoever for this Court to conclude that this is an extraordinary situation.[2]

I had always thought that sparing use of the extraordinary writs such as mandamus was a sound principle of judicial administration. If lawyers know they cannot run the mandamus track to the Court of Appeals in routine cases, then the time and talent of the Court of Appeals will be expended on cases in which appeal is a matter of right, or on those rare situations in which an extraordinary writ is absolutely necessary to prevent a grave injustice or to avoid some severe and pervasive procedural chaos. The serious backlog in the civil docket in this Court provides added reason why the extraordinary writs should be used sparingly and not passed out in profligate fashion.

The effect of this case will be that U. S. Attorneys, the Bureau of Prisons, or even the Board of Parole will be encouraged to pepper this Court with petitions for mandamus whenever the mood strikes and the District Judge acts after the 120 days have passed. I say this because of the language in the majority opinion which suggests that if the District Judge does not act

[1]Even though the Court specifically stated it was "retaining jurisdiction" over the matter of the fine, in light of Rule 35 as construed by the majority, such a statement was unavailing.

[2]While the dates differ somewhat as to Defendant Friedman, the considerations in his case call for no different result, whether my view or that of the majority prevails. I omit the details for brevity's sake.

"with reasonable speed after the timely motion is filed," he will lose jurisdiction. I know from my own experience (and from the experience of other District Judges) that even when the motion is filed within 120 days, often a considerable amount of time elapses before the Judge can act. Many District Judges do as I myself do when a Rule 35 motion is received: I ask the Bureau of Prisons for a report on the status, conditions and progress of the Defendant in the institution in which he is confined. It usually takes at least 60 or 90 days for a significant report to be prepared by the Bureau of Prisons. From time to time, the report itself suggests the necessity for exploration and further study of particular aspects of the case. In such an event, a request to the Bureau of Prisons may well result in a further delay of one or two months. Hence, the majority result produces a situation in which, at the whim of some lower level employee in the Board of Parole or Bureau of Prisons, or perhaps in the Justice Department or Prosecutor's Office, a mandamus challenge will be flung to the action of the District Courts, thereby adding to this Court's already serious stack of unfinished civil business.

I would do here as this Court did in *Carter, supra.* There the District Judge placed two 18-year-old boys and a 19-year-old girl on probation, even though the existent provisions of the 1956 Narcotics Control Act specifically forbade such probationary sentences. *U.S. v. Lane, supra.* But the Government dilly-dallied (in one case, a year, and in the other only four months!) before seeking mandamus relief. The Court exercised its discretion—wisely, I believe—by withholding mandamus relief. Nor do I believe that promptness by the Prosecutor is the only measure of extraordinariness. But it is surely one of its hallmarks.

As the majority notes in its opinion, the Government "double shot" in this case by filing notice of appeal as well as seeking to invoke our mandamus jurisdiction. If my view on mandamus were to have prevailed, then it would be necessary for us to determine whether an appeal would lie under the provisions of the statute governing an appeal by the Government, 28 U.S.C. 3731. However, since my view as to the mandamus has not prevailed, it seems unnecessary for me to discuss the question of whether the order is appealable.

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